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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/038,296	01/02/2002	Adrian Kawa	10047-Kintaro	8420

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EXAMINER	
STULII, VERA	

ART UNIT	PAPER NUMBER
1761	

MAIL DATE	DELIVERY MODE
05/01/2007	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No.	Applicant(s)	
	10/038,296	KAWA ET AL.	
	Examiner	Art Unit	
	Vera Stulii	1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *08 February 2007*.

2a)☐ This action is **FINAL**. 2b)☒ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-3,5-12 and 14-16* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-3,5-12 and 14-16* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____.

DETAILED ACTION

Double Patenting

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 1-3, 5-12, and 14-16 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-3, 5-12, and 14-16 of copending Application No. 10/500735.

Both application claim a method of flavoring sake with fresh produce comprising the steps of: contacting a quantity of sake with a quantity of finely divided fresh produce to form a produce sake mixture; aging the produce sake mixture at a reduced temperature (between 33°F and 50°F) for a predetermined time; separating the aged produce sake mixture into raw flavored sake and insoluble material; subjecting the raw

flavored sake to a rapid pasteurization process to produce pasteurized flavored sake; and adding a preservative to produce fully stabilized flavored sake.

Both applications claim a method of flavoring sake with whole produce concentrate comprising the steps of: contacting a quantity sake with a quantity of whole produce concentrate; blending the whole produce concentrate and the sake to form a produce sake mixture; subjecting the produce sake mixture to a rapid pasteurization process to produce pasteurized flavored sake; and adding a preservative to the pasteurized flavored sake to produce fully stabilized flavored sake, separating insoluble material from the produce sake mixture prior to the step of subjecting to a rapid pasteurization process. Both applications claim that at least one of the steps of contacting and blending, separating is carried out at a reduced temperature (between 33°F and 50°F).

Both applications claim the rapid pasteurization process is selected from the group consisting of flash pasteurization and tunnel pasteurization. Both application claim the preservative is selected from the group consisting of sulfur dioxide, sodium sulfite, potassium sulfite, potassium sorbate, sodium sorbate, potassium benzoate and sodium benzoate, wherein the preservative further includes a material selected from the group consisted of ascorbic acid, ascorbic acid derivatives, citric acid citric acid derivatives, malic acid and malic acid derivatives.

Application '735 does not recite providing a quantity of sake having alcohol content of about 14-20%. It would have been obvious to provide the quantity of sake before contacting it with fruit. It would also have been obvious to provide sake with the

alcohol content as recited, since it was well known in the art that alcohol content of sake is about 14- 20%.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

Claim Rejections - 35 USC § 103

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claims 1-6 are rejected under 35 U.S.C. 103(a) as being unpatentable over New York Times in view of Amerine et al (Table Wines). References Wiley Encyclopedia of Food Science and Technology and winebusiness.com are cited as evidence as discussed below.

In regard to claim 1, New York Times (p.3) discloses providing a quantity of sake (rice wine), contacting a quantity of sake with a quantity of finely divided fresh produce (peaches cut in half and then thinly sliced) (p.3) to form a produce sake mixture, aging the produce sake mixture at a reduced temperature for a predetermined time ("refrigerate 24 hours") (p.3), separating the aged produce sake mixture into a raw flavored sake and insoluble material ("strain sake through cheesecloth into clean decanter") (p.3). New York Times discloses serving infused sake immediately or refrigerate infused sake in a sealed bottle for up to 5 days. As evidenced by Wiley Encyclopedia of Food Science and Technology, sake has a 14 to 20% alcohol content.

In regard to claim 2, New York Times (p.3) discloses aging the produce sake mixture under refrigeration conditions. Claim 2 recites specific range of temperatures

(between 33° F and 50° F). It was well known in the art that refrigerator temperatures (35° F-38° F preferred) are in the range recited in claim 2.

New York Times does not disclose pasteurization of sake, and addition of a preservative to sake.

Amerine et al disclose that pasteurization of wines controls bacterial diseases or prevents spoilage of sound wines under unfavorable conditions and promotes stability (pp. 212, 563). Amerine et al disclose that"[p]asteurizing as a means of preserving wines particularly susceptible to bacteria diseases or to fermentation by yeast may be accomplished by several ways" (p.563). Amerine et al disclose flash-pasteurization (p.563) and tunnel pasteurization (pp. 212-213). Amerine et al also disclose the use of sulfur dioxide as an antimicrobial, antiseptic and preservative agent that prevents undesirable changes in color and flavor (pp.380, 396). Amerine et al also discloses that sulfur dioxide prevents "microbial spoilage and protects wines against excessive oxidation during storage and aging" when used in minimal quantities (p.380). Amerine et al also discloses sorbic acids and sorbates as antiseptic agents (p. 408). Amerine et al also disclose partially replacing sulfur dioxide with ascorbic acid (p.416). Amerine et al also discloses that "the antioxidative properties of sulfur dioxide have been replaced or supplemented by ascorbic acid. These replacements sometimes proved beneficial, particularly when the effectiveness of the mixture was increased by synergistic action" (p.416).

Since New York Times discloses serving infused sake immediately or refrigerate infused sake in a sealed bottle for up to 5 days, it is clear that in this case pasteurization

and addition of preservatives is not necessary. However, if the further storage of infused rice wine is desired, one of the ordinary skill in the art would have been motivated to employ traditional steps of wine preservation such as pasteurization and addition of preservatives as disclosed by Amerine et al. One would have been motivated to employ traditional steps of ***wine*** preservation because sake is a ***rice wine*** product. Since introduction of raw fresh fruit into sake would lead to yeast and bacterial contamination, one of the ordinary skill in the art would have been motivated to employ pasteurization as a way of preserving wines particularly susceptible to bacteria diseases or to fermentation by yeast as taught by Amerine et al. One of the ordinary skill in the art would have been motivated to use either tunnel or flash pasteurization, since both methods are well established in the art specifically for wine pasteurization as taught by Amerine et al. Further as evidenced by winebusiness.com, " [a] non-chemical alternative upon which diaries and sake makers ***have long relied*** is flash pasteurization" (p.5). Thus, flash pasteurization was well known in the art of sake making. One would also have been motivated to use flash-pasteurization as a wine pasteurization method as taught by Amerine et al which is specifically used for sake preservation as evidenced by winebusiness.com. One of the ordinary skill in the art would have been motivated to further add preservatives to the rice wine/sake, since both steps of pasteurization and adding preservatives are traditional and necessary steps in production of wines as taught by Amerine et al. One of [redacted] ordinary skill in the art would have been motivated to add preservatives to the infused rice wine/sake such as sulfur dioxide in order to prevent microbial spoilage and to protect wines against

excessive oxidation during storage and aging as taught by Amerine et al. One of the ordinary skill in the art would have been motivated to further include a preservative such as ascorbic acid in order to control the quantity of sulfur dioxide and to supplement antioxidative properties of sulfur dioxide as taught by Amerine et al.

Claims 7-12 and 14-16 are rejected under 35 U.S.C. 103(a) as being unpatentable over New York Times in view of Amerine et al (Table Wines) and Nagao et al. (JP 07-059553). References Wiley Encyclopedia of Food Science and Technology and winebusiness.com are cited as evidence as discussed above.

New York Times and Amerine et al are taken as cited above.

New York Times and Amerine et al do not disclose using whole fruit concentrate.

Nagao et al. (JP 07-059553) discloses contacting a quantity of sake with a quantity of whole produce concentrate (fruit juice), blending the whole produce concentrate and the sake to form a produce sake mixture, and subjecting the produce sake mixture to a rapid pasteurization process (Abstract).

Since New York Times discloses infusion of sake/rice wine using fresh raw fruits such as peaches, cantaloupe, raspberries, pineapple, and strawberry, and Nagao et al discloses producing fruit flavor alcoholic beverage by contacting sake with fruit juice, one of [redacted] ordinary skill in the art would have been motivated to substitute thinly sliced fruits with fruit juice in order to produce fruit flavored sake in cases when fresh fruits are not readily available. One of the ordinary skill in the art would have been motivated to further add preservatives such as sulfur dioxide and ascorbic acid to the infused sake and to use flash pasteurization method for the reasons stated above.

Response to Arguments

Applicant's arguments with respect to claims 1-3, 5-12, and 14-16 have been considered but are moot in view of the new ground(s) of rejection.

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Vera Stulii whose telephone number is (571) 272-3221. The examiner can normally be reached on 7:00 am-3:30 pm, Monday-Friday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (571) 272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

Vera Stulii

KEITH HENDRICKS
PRIMARY EXAMINER